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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of **Distribution of the 2004, 2005, 2006 2007, 2008 and 2009 Cable Royalty Funds**	)	**Docket No. 2012-6 CRB CD 2004-2009 (Phase II)**
In the Matter of **Distribution of the 1999-2009 Satellite Royalty Funds**	)	**Docket No. 2012-7 CRB SD 1999-2009 (Phase II)**

MPAA-REPRESENTED PROGRAM SUPPLIERS'

PROPOSED FINDINGS OF FACT AND PROPOSED CONCLUSIONS OF LAW

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GLOSSARY

Term	**Definition**
1999-2009 Satellite Funds	1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009 Section 119 royalty funds collected by the Licensing Division of the Copyright Office
2000-2003 Decision	*Distribution Of The 2000, 2001, 2002, And 2003 Cable Royalty Funds*, 78 Fed. Reg. 64984 (October 30, 2013).
2000-2009 Satellite Funds	2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009 Section 119 royalty funds collected by the Licensing Division of the Copyright Office; the only satellite royalty years remaining in controversy in this proceeding in the Program Suppliers category
2004-2009 Cable Funds	2004, 2005, 2006, 2007, 2008, and 2009 Section 111 royalty funds collected by the Licensing Division of the Copyright Office
CARP	Copyright Arbitration Royalty Panel
CDC	Cable Data Corporation
CRT	Copyright Royalty Tribunal
CRTC	Canadian Radio-television and Telecommunications Commission
CSO	Cable System Operator
D.C. Circuit	U.S. Court of Appeals for the District of Columbia Circuit
Devotional Claimants	Syndicated programs of a primarily religious theme, not limited to those produced by or for religious institutions
DMA	Nielsen Designated Market Area
FCC	Federal Communications Commission
Gracenote	Gracenote, Inc., formerly known as Tribune Media Services, Inc.
Gray Cable Stations	Sample stations randomly selected by Dr. Gray for the 2004-2009 Cable Funds

Gray Satellite Stations	Sample stations randomly selected by Dr. Gray for the 2000, 2001, 2002, 2003, 2004, 2005, and 2006 satellite royalty funds; a census of all satellite stations that were distantly retransmitted for the 2007, 2008, and 2009 satellite royalty funds
Gray Stations	Gray Cable Stations and Gray Satellite Stations, collectively
Household Meter	Nielsen data collection device which measures television set tuning (*i.e.*, what channel the set is tuned to).
IPG	Worldwide Subsidy Group LLC d/b/a Independent Producers Group
Judges	Copyright Royalty Judges
Kessler Cable Stations	Cable stations for the 2000, 2001, 2002, and 2003 royalty years selected by Marsha Kessler of MPAA for the Nielsen Diary Studies
Kessler Satellite Stations	Satellite stations for the 2000, 2001, 2002, and 2003 royalty years selected by Marsha Kessler of MPAA for the Nielsen Diary Studies
Kessler Stations	Kessler Cable Stations and Kessler Satellite Stations, collectively
Librarian	Librarian of Congress
May 4 Order	*Order Reopening The Record And Scheduling Further Proceedings* (May 4, 2016).
MPAA	Motion Picture Association of America, Inc., and its represented Program Suppliers claimants
MSO	Multiple System Operator
Nielsen	The Nielsen Company
Nielsen Diary Data	Viewing data used for generating national cable and broadcast network ratings collected from Nielsen diaries during 2000-2003 for the "sweeps" months of November, February, May, July, and in some cases October and March

Nielsen Distant Viewing Diary Data	Nielsen's custom analyses of the Nielsen Diary Data of compensable viewing for the Kessler Stations
Nielsen Local Ratings Data	Nielsen local ratings data for the Gray Stations
Nielsen Distant Viewing Household Meter Data	Nielsen's custom analyses of the NPM database measuring distant viewing to cable and satellite households for 2008 and 2009.
NPM	Nielsen's National People Meter database
People Meter	Nielsen electronic data collection device, which is the equivalent of the household Set Meter in that it identifies what channel the set is tuned to, but also has a separate meter which allows people to push buttons to indicate which viewers in the household are in the room.
Preliminary Hearing Order	*Memorandum Opinion And Ruling On Validity And Categorization Of Claims* (March 13, 2015).
Program Suppliers	Syndicated series, specials and movies, other than Devotional Claimants programs as defined below. Syndicated series and specials are defined as including (1) programs licensed to and broadcast by at least one U.S. commercial television station during the calendar year in question, (2) programs produced by or for a broadcast station that are broadcast by two or more U.S. television stations during the calendar year in question, and (3) programs produced by or for a U.S. commercial television station that are comprised predominantly of syndicated elements, such as music video shows, cartoon shows, "PM Magazine," and locally hosted movie shows
SDC	Settling Devotional Claimants
Section 111	17 U.S.C. § 111
Section 119	17 U.S.C. § 119
Set Meter	Nielsen electronic data collection device attached to a television set in a particular household that detects the channel to which the television is being tuned.

SOAs	Statements of Account
SSO	Satellite System Operator
WGNA	WGN-America, a superstation airing throughout the U.S.
WGN-local	WGN's local feed, airing in the Chicago DMA

PROPOSED FINDINGS OF FACT

I. Sections 111 and 119 Background

1. Sections 111 and 119 of the Copyright Act establish statutory licenses permitting CSOs and SSOs, respectively, to retransmit broadcast signals outside of their local area of license (that is, on a distant basis), provided that the CSOs and SSOs pay the statutorily-prescribed royalty fees to the Licensing Division of the Copyright Office semi-annually. In the case of Section 111, the prescribed fees are based primarily on CSO gross receipts and the number and type of distant stations each CSO chooses to carry. In the case of Section 119, the royalty fees are based on the number of satellite subscribers receiving distant stations. After collecting the royalty payments from CSOs and SSOs, upon authority of the Judges, the Copyright Office distributes the royalties among copyright owners of compensable programs contained in the distant signals (or their representatives), either by agreement reached among the claimants or pursuant to the determination in a cable royalty distribution proceeding held before the Judges. Exhibit 8010, Appendix A at 6-21; Exhibit 8002 at 5-8.

2. To be considered eligible for compensation under Section 111, a program must be: (1) initially transmitted by a broadcast television station that either the FCC or the Canadian or Mexican governments has licensed to a particular community on a specific channel; (2) included in the distant simultaneous retransmission of the broadcast station by a cable system (a station *transmits* and the cable system *retransmits*); and (3) nonnetwork – that is, it is not a program distributed by the ABC, CBS or NBC networks via their affiliated stations. Exhibit 8010, Appendix A at 4.

3. Similar to Section 111, under Section 119, nonnetwork programs are eligible for compensation. However, unlike under Section 111, network programs retransmitted by SSOs are also eligible for compensation under Section 119. Exhibit 8005 at 8.

II. MPAA-represented Program Suppliers' Claim In This Proceeding

4. MPAA-represented Program Suppliers consist of approximately 100 claimants each year for the 2004-2009 Cable Funds and 2000-2009 Satellite Funds. Each MPAA claimant (1) filed a cable or satellite royalty claim for the royalty year at issue, (2) signed a representation agreement with MPAA, and (3) for each royalty year, executed a document certifying its authority to claim cable and satellite royalties attributable to particular programs. Because many of these MPAA-represented claimants filed joint claims, have multiple subsidiaries, and include royalty collection agents, MPAA directly and indirectly represents between 3,000 and 4,000 claimants per cable royalty year, and between 900 and 4,000 claimants per satellite royalty year. Where a MPAA-represented claimant filed a joint Section 111 or 119 claim on behalf of its subsidiaries, or as the agent of copyright owners, the claimant bound the joint claimants to its agreement with MPAA, which specifically authorizes MPAA to represent all entities listed on the joint claim. Exhibit 8004 at 4-5, 8-9; Exhibit 8005 at 4-6, 9-10.

5. MPAA-represented Program Suppliers include not only the major U.S. production studios, but also dozens of smaller producers and syndicators from both the U.S. and many parts of the world – all of whom have filed claims seeking a share of the royalty pool for a particular royalty year. Exhibit 8004 at 5-8; Exhibit 8005 at 5-9.

6. Together, MPAA-represented Program Suppliers represent approximately 68,000 titles and hundreds of thousands of hours of valuable programming retransmitted by CSOs and

SSOs for the 2004-2009 cable royalty years and the 2000-2009 satellite royalty years. MPAA-represented Program Suppliers' programs consist of thousands of unique series, movies and specials, including game shows, live action and/or animated series and sitcoms, news magazines, interview and talk shows, sports shows and sporting events, award shows and pageants, health and fitness shows, and animal shows. These shows air in English as well as in Spanish, and many of them were retransmitted multiple times over the relevant royalty years. Exhibit 8004 at 7-8; Exhibit 8005 at 8-9.

7. Historically, MPAA has represented the vast majority of claimed compensable programs at issue within the Program Suppliers category in Phase II proceedings. In each of the prior litigated Phase II proceedings since 1979, MPAA-represented Program Suppliers have received most of the royalties awarded to the Program Suppliers category—on average, 98.4% of each Phase II award in the Program Suppliers category, notwithstanding multiple Phase II claimants within the Program Suppliers category in most of those years. Exhibit 8002 at 8-9. In the most recent litigated Phase II Proceeding addressing the allocation of Program Supplier royalties, the 2000-2003 Cable Phase II Proceeding, MPAA received royalty shares of 98.84% in 2000, 99.69% in 2001, 99.64% in 2002, and 99.77% in 2003. The D.C. Circuit affirmed these awards. *See id.*; *see also Indep. Producers Group v. Librarian of Cong.*, 792 F.3d 132 (D.C. Cir. 2015); 78 Fed. Reg. 64984 (Oct. 30, 2013) ("2000-2003 Decision").

III. IPG's Program Suppliers Claims In This Proceeding

8. IPG originally claimed to represent the interests of 118 entities in the Program Suppliers category as to the 2004-2009 Cable Funds, and 153 entities in the Program Suppliers category as to the 2000-2009 Satellite Funds. *See* Direct Statements Of Independent Producers

Group, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at Exhibits IPG-1(May 9, 2014).

9. On March 13, 2015, by their Preliminary Hearing Order, the Judges dismissed 32 IPG Program Suppliers claimants as to some or all of the 2004-2009 Cable Funds, and 83 IPG Program Suppliers claimants as to some or all of the 2000-2009 Satellite Funds. As a result of these dismissals, the list of IPG-represented Program Suppliers claimants for the 2004-2009 Cable Funds shrank to 88 entities in 2004, 88 entities in 2005, 87 entities in 2006, 89 entities in 2007, 88 entities in 2008, and 88 entities in 2009. For the 2000-2009 Satellite Funds, the list of IPG-represented Program Supplier claimants decreased to 101 entities in 2000, 110 entities in 2001, 111 entities in 2002, 112 entities in 2003, 111 entities in 2004, 111 entities in 2005, 110 entities in 2006, 111 entities in 2007, 79 entities in 2008, and 111 entities in 2009. *See* Preliminary Hearing Order at 28-35 and Exhibit A. On October 27, 2016, the Judges modified the Preliminary Hearing Order to credit IPG with one claimant that had previously been dismissed as to the 2008 satellite royalty year, thereby revising the number of IPG-represented Program Supplier entities for 2008 satellite to 80. Tr. at 376-77 (Gray); s*ee also Order Granting IPG Fourth Motion For Modification Of March 13, 2015 Order* at 1-2 (October 27, 2016).

IV. Elements Of MPAA's Methodology

A. CDC Carriage Reports

10. Jonda K. Martin is the President and owner of CDC. CDC collects and analyzes data reported on SOAs that cable and satellite systems file with the Licensing Division of the Copyright Office and then generates both standard and custom reports capturing that data for clients. CDC makes its information available to users by purchase, either on an as-needed basis, or by subscription. CDC is the only company providing such a service. Ms. Martin has worked

at CDC for more than 25 years, and oversees all of its operations, including the management and distribution of CDC data. Exhibit 8000 at 1.

11. Numerous parties involved in the cable and satellite industries rely on data collected by CDC. CDC data is particularly used by participants in cable and satellite royalty distribution proceedings, as well as others involved in the cable and satellite industries, such as television stations, group owners, and cable systems. As a result, CDC data have been presented over the years to the CRT, the CARP, and the Judges in virtually all of the cable and satellite copyright royalty distribution proceedings and rate adjustment proceedings. Exhibit 8000 at 2.

12. CDC provided MPAA with customized data reports for each of the 2004-2009 cable and 2000-2009 satellite royalty years. For each royalty year, these data reports listed all commercial broadcast stations carried as full-time distant signals by cable and satellite systems, the number of distant subscribers to which each station was available, and CDC's calculation of the distant fees generated by that station. For his analysis, MPAA's expert, Dr. Jeffrey Gray, selected sample stations for each royalty year at issue in this proceeding from these data. Exhibit 8000 at 3.

13. For the 2008 and 2009 cable and satellite royalty years, CDC also performed a county analysis, which was then provided to Nielsen. CDC analyzed the cable and satellite stations selected by Dr. Gray to determine which fall within the station's local service area using the FCC signal carriage rules. A county was deemed local to the station under analysis if it met at least one of the following criteria: (1) it fell within the station's Designated Market Area ("DMA"); (2) the station was deemed "significantly viewed" per the FCC from the county; or (3)

other factors that would qualify a county as local to the station in question. Ex. 8000 at 4 and Appendix A; Tr. at 308-09 (Lindstrom).

B. Selection Of Sample Stations Used In The Nielsen Diary Studies

14. Marsha Kessler served as Vice President, Retransmission Royalty Distribution, at MPAA for approximately 28 years. She retired from that position in August of 2010. During her tenure at MPAA, Ms. Kessler was directly responsible for receiving and distributing §§ 111 and 119 compulsory license royalties from cable and satellite systems. Ms. Kessler testified before the CRT, the CARP, the Judges, and the Canadian Copyright Board on numerous occasions. Before joining MPAA, Ms. Kessler served on the original staff of the Copyright Office's Licensing Division, the division responsible for processing compulsory license royalty payments. Exhibit 8010 at 1; Exhibit 8011 at 1.

15. Ms. Kessler selected the Kessler Cable Stations and Kessler Satellite Stations whose compensable programming would be the basis for the remuneration of royalties to MPAA-represented claimants. First, Ms. Kessler obtained from CDC a listing of broadcast stations that were retransmitted as distant signals by cable and satellite systems during 2000 through 2003. Second, Ms. Kessler excluded Canadian, Mexican and public television stations. Third, for each delivery system, Ms. Kessler ranked stations according to the number of distant subscribers. She then selected her sample stations based on a combination of fees generated and distant subscribers. Finally, Ms. Kessler performed a county analysis, which is a county-by-county analysis for each of the stations, the end result of which identifies, based on FCC rules, the counties deemed "local" viewing areas for each station. Exhibit 8012 at 114-127; Exhibit 8010 at 11-13 and Appendices D, E, and F; Exhibit 8005 at 10-11 and Appendix C.

16. Ms. Kessler forwarded the Kessler Cable Stations to Nielsen, instructing Nielsen to provide program by program viewing measurements for each station, but to exclude from each such station's measurements viewing to each station from counties deemed local; Nielsen was to produce only viewing outside the local counties (*i.e.*, distant viewing). Exhibit 8012 at 114-127; Exhibit 8010 at 13-14.

17. Ms. Kessler also forwarded the Kessler Satellite Stations to Nielsen and requested a similar viewing study be conducted for those stations. Exhibit 8005 at 10-11; Tr. at 298-300 (Lindstrom).

C. Nielsen Viewing Data

18. Mr. Paul B. Lindstrom was a Senior Vice President at Nielsen until his retirement in June 2017. He worked at Nielsen for 39 years, and was in charge of research design and analysis for Nielsen's Strategic Media Research group. Mr. Lindstrom's work at Nielsen included designing custom research with a particular focus on new television viewing sources and audience measurement of new services that might compete with television. Mr. Lindstrom has performed custom research for various different forms of media, including cable television, pay-TV, satellite services, over-the-air subscription television, VCRs, PCs, on-line services, the Internet, DVDs, cinema, and most recently, place-based and location-based digital networks. Mr. Lindstrom was responsible for all national custom research and all custom research for local cable. Exhibit 8001 at 1; Exhibit 8013 at 1-2; Exhibit 8014 at 281-287; Tr. at 282-87 (Lindstrom).

19. Mr. Lindstrom has testified in every litigated cable royalty distribution proceeding since 1980, and has testified before the CRT, the CARP and the Judges. Exhibit 8013 at 2; Exhibit 8014 at 287; Exhibit 8001 at 2; Tr. at 287 (Lindstrom).

20. Mr. Lindstrom has been qualified as an expert in the field of market research with an emphasis on broadcast television and cable audience measurement. Exhibit 8014 at 287-88; Tr. at 290 (Lindstrom).

21. The Nielsen name is synonymous with television ratings. Nielsen is a well-regarded and highly used source of audience measurement information in the television industry. Nielsen ratings provide an estimate of television audience size and are a barometer for viewing choices and preferences. Exhibit 8001 at 2; Exhibit 8013 at 2; Exhibit 8002 at 17; Exhibit 7003 at 80-82, 86, 88.

22. Viewing information is important to broadcast networks, local and national syndicated programs, local cable system operators, MSOs, satellite carriers, and interconnects. Interconnects are aggregations of cable systems that cover a particular market or region, thus allowing an agency or advertiser to buy a large area at one time without having to negotiate with many different companies. Exhibit 8001 at 2; Exhibit 8013 at 1-2; Exhibit 8002 at 11-13.

23. As more local cable and satellite advertising sellers sell local advertising time on cable channels, they need an agreed upon “currency” in order to maximize the value of their advertising time. Nielsen ratings offer that currency. Nielsen’s charter as an independent measurement service is to provide both the buyer and seller of time with unbiased estimates of viewing behavior. Exhibit 8001 at 3; Exhibit 8013 at 2.

24. Nielsen ratings are a statistical estimate of the number of homes tuned to a program. Ratings are based not on a count of all television households, but on the count within a sample of television households selected from all television households. The findings within the sample are then "projected" to national totals. A rating measures what percentage of the universe of television households are tuned in to a program. Exhibit 8001 at 3-4; Exhibit 8013 at 3.

25. During 2000-2009, Nielsen utilized two basic data collection instruments in syndicated services: meters and diaries. Exhibit 8001 at 3-4; Tr. at 290 (Lindstrom).

26. A Set Meter is an electronic device attached to a television set in a particular household that detects the channel to which the television is being tuned. The data from these set meters are then converted into household ratings. Household meter data is collected year-round in a random sample of households in selected geographic markets across the United States, *i.e.*, Nielsen's metered markets, during 2000-2009. Exhibit 8001 at 3-4; Exhibit 8002 at 18; Tr. at 300-04 (Lindstrom).

27. There are two types of set meters used by Nielsen. As described above, the household Set Meter measures only set tuning (*i.e.*, what channel the set is tuned to). The "People Meter" is the equivalent of the household meter in that it identifies what channel the set is tuned to, but also has a separate meter which allows people to push buttons to indicate who is in the room. Meters are considered to be a superior method for collecting viewing data, and the People Meter, in particular, has become a replacement for the diary information that had previously been used for demographics. Tr. at 301-04 (Lindstrom).

28. Diaries are paper booklets in which each person in the household records viewing information. During 2000-2003, Nielsen collected diary data in its metered markets for the months of November, February, May, July, and in some cases October and March, which are also known as the "sweeps" ratings periods. Seven-day diaries were mailed to homes randomly selected by Nielsen to keep a tally of programs watched on each television set and by whom, including channel numbers and call letters. Over the course of a four-week sweeps period, diaries were mailed to a new panel of randomly selected homes each week. At the end of each month, all of the viewing data from the individual weeks were aggregated into Nielsen's database. Each sweeps period yielded a sample of approximately 100,000 per sweep period or more than 400,000 households over the course of a year. Exhibit 8001 at 4-5; Exhibit 8013 at 4; Exhibit 8002 at 18; Exhibit 8014 at 290, 296-98, 312; Tr. 293-96 (Lindstrom).

29. Viewing, as measured by Nielsen, is the predominant standard by which all television programming is commercially evaluated. Standard Nielsen ratings – which are measured on a county-by-county basis – do not differentiate between distant and local viewing. Exhibit 8010 at 10, 12; Exhibit 7002 at 3, 6-7

30. MPAA relied on three different types of Nielsen data in this proceeding: (1) Nielsen Distant Viewing Diary data for the years 2000-2003, (2) Nielsen Local Ratings Data for the years 2000-2009, and (3) Nielsen Distant Viewing Household Meter data for the years 2008-2009. MPAA Exhibit 8001 at 4-5; Exhibit 8002 at 17-18; Tr. at 290-91 (Lindstrom).

1. Nielsen Distant Viewing Diary Data For 2000-2003

31. MPAA asked Mr. Lindstrom of Nielsen to produce estimates of distant cable and satellite viewing to the Kessler Stations. In response, Nielsen prepared the Nielsen Diary Studies. Exhibit 8013 at 5; Exhibit 8014 at 288; Tr. at 298-300 (Lindstrom).

32. The Nielsen Diary Studies for the Kessler Cable Stations excluded cable viewing to each station from counties that MPAA identified as local in its county analysis, or in other words, only measured distant viewing among cable households. The studies also excluded distant viewing to non-compensable programs, such as distant viewing to ABC, CBS and NBC network programs and programs that were not simultaneously broadcast on WGN-local and WGNA. Exhibit 8013 at 6; Tr. 298-300 (Lindstrom).

33. Nielsen also performed a custom analysis estimating viewing by satellite households to the Kessler Satellite Stations. While the methodology used for the satellite custom analysis is very similar to the methodology used for Mr. Lindstrom's 2000-2003 cable custom analysis, the methodology differs in some respects. For the 2000-2003 satellite Nielsen Diary Studies, Nielsen captured all viewing (network and non-network) to each of the Kessler Satellite Stations that occurred within satellite households. Exhibit 8001 at 5-6; Exhibit 8005 at 11 and Appendix C; Tr. 298-300 (Lindstrom).

34. Nielsen's cable and satellite custom analyses showed instances of so-called "zero viewing," or places where zero values appeared in the data. The appearance of these so-called "zero viewing" instances is consistent with what Mr. Lindstrom would expect to find in a custom analysis of viewing to distant signals by cable or satellite subscribers. As Mr. Lindstrom testified, where the viewing minutes to particular distant signal programs were so small as to be

statistically insignificant, Nielsen's custom analysis would assign a zero viewing value. Exhibit 8001 at 8; Exhibit 8013 at 6; Tr. at 312-24 (Lindstrom).

35. The label of "zero viewing" is actually a misnomer. Zero viewing data points are instances of relatively small samples where there are observed pockets of no reported distant viewing for a particular broadcast. It does not signify that there is no one actually watching a particular broadcast at a particular time. It is a situation that frequently occurs in sample data, and steps can be taken to address it. Those steps almost always include some sort of aggregation of data. Exhibit 8014 at 298-99, 408-09; Tr. at 312-24 (Lindstrom).

36. Typically, Nielsen will place a caret (^) or asterisk (*) in its data reports to signify that the audience is too small to be measured, but not a zero character. The zero viewing instances in the Nielsen Diary Studies prepared for MPAA indicate that there is no reported viewing within that sample of homes during that day and quarter hour. Because MPAA's viewership studies required that Nielsen aggregate quarter hours across stations, across time and across sweeps periods, it was necessary for Nielsen to assign a numeric value to such instances. Nielsen assigned a zero numeric value to all instances where there was no reported viewing. Notwithstanding these zero viewing instances, reliable estimates of viewing may be drawn from the aggregate data. Exhibit 8014 at 298-300; Tr. at 318-20 (Lindstrom).

37. High levels of zero viewing – in the 70 percent range, or more – are consistent with standard audience measurement across meters and diaries. Exhibit 8014 at 371-73; Tr. at 320-24 (Lindstrom).

38. Nielsen is a "fence sitter." While Mr. Lindstrom has testified for MPAA, Nielsen has done work for claimant parties in cable royalty distribution proceedings other than MPAA.

Exhibit 8014 at 416. In this proceeding, both MPAA and SDC are relying on Nielsen data in their respective methodologies. Exhibit 8002 at 11-30; Tr. 53-54 (Erdem); Tr. 173-74, 180 (Sanders).

2. Nielsen Local Ratings Data For 2000-2009

39. The Nielsen Local Ratings Data were collected by electronic meters attached to television sets in Nielsen metered markets. These data include information on the number and percentage of households in the station's local market tuned to the station for each quarter-hour for every day throughout the year. Exhibit 8001 at 7-8; Exhibit 8002 at 19.

3. Nielsen Distant Viewing Household Meter Data For 2008-2009

40. The Nielsen Household Meter data is based on a random sample of people in the United States. Similar in collection methodology to the Nielsen Local Ratings data, Nielsen National Household Meter data is collected by electronic meters attached to television sets together with individual meters held by individual household members. Based upon the national data they collected, Nielsen performed custom analyses on the NPM database to calculate the level of distant viewing by cable and satellite households to television stations, respectively, for each fifteen-minute interval (quarter hour) of the day, 7 days per week, and 365 days per year for both 2008 and 2009. From the total metered viewing, Nielsen extracts the distant viewing to Dr. Gray's cable and satellite stations for 2008 and 2009. Exhibit 8001 at 6-7; Exhibit 8002 at 19; Tr. at 300-11 (Lindstrom).

41. The NPM database includes Nielsen metered data from Set Meters, People Meters, and Local People Meters. Nielsen recommended using the NPM database for the later royalty years because during the 2004-2009 time frame, the Local People Meter had begun to

become more prevalent, and as more markets began to be measured with a Local People Meter, less markets had diary data available to them. Further, the markets that were switching to Local People Meter tended to be the largest, so using diary data in lieu of Local People Meter data would have caused systemic bias. In addition, the Local People Meter is considered to be a superior method for collecting viewing data. Exhibit 8001 at 6-7; Tr. at 300-08 (Lindstrom).

D. Regression Analysis

42. Dr. Gray is currently the President of Analytics Research Group, LLC. Immediately prior to this position, he was a Principal at Deloitte Financial Advisory Services, LLP, where he served as the National Director of their Economic Statistical Consulting Practice. Exhibit 8002 at 1; Tr. at 370-71 (Gray).

43. Dr. Gray is an expert witness in the fields of economics, statistics, and econometrics. Tr. at 374 (Gray).

44. Dr. Gray served as a consultant to CSOs regarding the value of programming content on channels carried by their cable systems. Exhibit 8002 at 1-2.

45. The economic standard that Dr. Gray applied to allocate royalties between MPAA and IPG was relative market value. Exhibit 8002 at 11-12; Tr. at 377-78 (Gray).

1. Application Of The Relative Market Value Standard

46. Relative market value corresponds to the price at which the right to retransmit a program carried on a distant broadcast signal would change hands between a willing buyer (a CSO or an SSO) and a willing seller (a copyright owner), neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. The “willing buyer” in this hypothetical negotiation is either the CSO or SSO because they choose which distant signal

channels to carry. CSOs and SSOs bundle distant signal channels with cable channels, local broadcast channels and pay-per-view channels in different packages. The CSOs and SSOs then offer the packages to existing and potential subscribers at varying prices. While CSOs and SSOs base their channel and bundling decisions on attracting and retaining subscribers, other cost considerations factor into their decisions regarding which distant channels to retransmit and how to bundle them. Exhibit 8002 at 11-13.

47. Programming at issue within the Program Suppliers category in this Phase II proceeding is generally homogenous. As a result, the incremental costs to CSOs and SSOs associated with the carriage of Program Suppliers programs and the differential impact on subscriber growth of these programs can reasonably be assumed to be similar. Analysis in this Phase II proceeding should therefore concentrate on quantifying subscriber viewing patterns in determining relative market value because of the homogenous nature of Program Suppliers' programming. Exhibit 8002 at 12-13; Tr. at 88-95 (Erdem).

48. The relative market value of a program in this Phase II proceeding ultimately depends upon the consumption of the programming as measured by its level of viewing. As explained by actual Program Suppliers copyright owners, audience size – as measured by viewership – is central when making licensing deals with broadcast stations and cable networks in the world outside the compulsory licensing scheme. Moreover, in an attempt to attract and retain customers, CSOs and SSOs want to carry programming with high viewership such as syndicated television series that originally attracted a loyal following in their network showing and continue to do so in syndication. CSOs and SSOs also carry genres of first-run syndicated programs that they believe will garner satisfactory audience levels. Exhibit 8002 at 12-13; Tr. at 377-79 (Gray).

49. Since this proceeding involves allocating a fixed royalty pool as part of a compulsory licensing scheme, it is entirely appropriate to consider pertinent information concerning the relative economic value of programming, namely program consumption as measured by actual program viewing. Purposefully ignoring actual viewing or ratings could lead to copyright owners of valuable programming receiving disproportionately small royalty awards. Exhibit 8002 at 13.

2. Measuring Relative Market Value

50. Subscriber preferences are revealed by which distant stations and programs they choose to watch. Subscriber preferences may also be revealed by whether they continue to subscribe to the CSO or SSO. Exhibit 8002 at 14.

a. Volume

51. Holding costs constant, CSOs and SSOs will choose to carry distant signals with programming that they can add to their lineup to attract and retain as many subscribers as possible. In theory, the economic-optimizing (*i.e.*, rational) CSO or SSO will choose to carry distant signals with the most preferred programming airing at the most preferred times. The total volume of minutes of programming retransmitted by CSOs and SSOs effectively represents the amount of programming they purchase. Therefore, total program volume represents the economic-optimizing CSO and SSO choices and provides a measure of the relative economic value of the programming to the CSOs and SSOs. Exhibit 8002 at 14.

52. While total program volume, or the total number of minutes of programming retransmitted on distant signals, provides useful information concerning the relative value of programming to CSOs and SSOs, that measure alone is not sufficient. In general, programs' values to the CSO and SSOs and their subscribers may differ depending on the time slot during

which the programs are shown. A 30-minute program shown during primetime might be more valuable to a CSO or SSO and its subscribers than an hour-long program shown in the middle of the night. Moreover, programs of identical duration shown at the same time of day may have very different values to operators and their subscribers. That is, programming volume alone does not convey a complete picture of the relative value of the programs. Exhibit 8002 at 14-15.

b. Viewership

53. Audience size, which is determined through program viewership, is the primary interest of programmers and, therefore, the most direct measure of a program's relative value. From the CSO or SSO's perspective, the more a program attracts subscribers to watch and keep coming back to watch, the more valuable the program is to their net-revenue maximizing goal of retaining and growing subscriber count. From the subscriber's perspective, relatively low viewership of a given program reflects the value ascribed to that program by subscribers, CSOs, and SSOs. Absent the bundling of programs, economic theory implies that a program with no viewership will most likely not continue to be carried. Exhibit 8002 at 15; Tr. at 135-37 (Erdem).

54. Program viewership as a measure of relative market value is consistent with economic theory: a CSO or SSO's willingness to pay for a particular program is a function of that program's contribution to their ability to attract and retain subscribers and thereby maximize net revenue. Exhibit 8002 at 15; Tr. at 135-37 (Erdem).

3. Determining The Relative Market Value Of MPAA Programming Versus IPG Programming

55. Dr. Gray's methodology applies a two-step approach to determining the relative market value of MPAA and IPG compensable programming. First, he calculated the relative

volume of MPAA programming and IPG programming. This provides a good, but imperfect indicator of the relative value of the two sets of programs. Second, he calculated the relative viewership of MPAA programming and IPG programming. This is the most direct measure of relative value: if costs are deemed constant, and without taking subscriber growth into account, then, the higher subscriber viewership will suggest higher relative market value of the programming. Exhibit 8002 at 15-16; Tr. at 379, 383-84 (Gray).

56. Dr. Gray relies upon Nielsen ratings data and viewing data in combination with Gracenote data to study the volume and viewing information of compensable programs from 2000 through 2009. He also relies upon CDC data that includes information on the number of CSO and SSO subscribers of each distantly retransmitted signal analyzed, and, for his cable analysis, CRTC program logs to determine the country of origin of programs claimed by both IPG and MPAA which aired on Canadian stations. Programming aired on Canadian stations which originated from countries other than the United States are not compensable as Program Suppliers programs. Exhibit 8002 at 16-21; Exhibit 8011 at Addendum B; Tr. at 379-84 (Gray).

57. There were over 1,000 stations that were distantly retransmitted by CSOs each year from 2004 to 2009. Due to cost considerations in obtaining Nielsen Local Ratings data and Gracenote data for all these stations, Dr. Gray implemented a stratified random sampling methodology to identify a sample of distantly retransmitted stations each year from 2004 to 2009, the Gray Cable Stations. Each year's random sample included both large and small stations in terms of the number of distant subscribers as well as fees generated. The Gray Cable Stations were given to Nielsen and to Gracenote. For all of these stations and years for which data was available, Nielsen provided Local Ratings data and Gracenote provided the Gracenote data to Dr. Gray. Exhibit 8002 at 16-17, 21; Tr. at 380-86 (Gray).

58. The number of stations that were distantly retransmitted by satellite carriers varied each year from only 62 in 2008 to over 650 in 2006. Dr. Gray implemented a stratified random sampling methodology in each year from 2000 to 2006. Dr. Gray requested Nielsen and Gracenote data for these randomly selected stations each year as well as data for all distantly retransmitted satellite stations each year from 2007 to 2009. Collectively, these are the Gray Satellite Stations. Each year's list included both large and small stations in terms of the number of distant subscribers as well as fees generated. Exhibit 8002 at 16-17, 21; Tr. at 380-86 (Gray).

59. Dr. Gray excluded all network programming from his cable analysis because it is non-compensable under Section 111. Dr. Gray also excluded, as non-compensable, programs airing on WGN-local that were not simultaneously broadcast on WGNA. Exhibit 8002 at 19-20.

60. To determine the relative market value of compensable Program Suppliers programs that aired on distantly retransmitted stations, it is appropriate to calculate the relative viewing of those programs on a distant basis. To do so, Dr. Gray first calculates the mathematical relationship between distant viewing levels for the years the data is available and various program characteristics during those years, and then extrapolates that mathematical relationship to estimate distant viewing for compensable programs each cable royalty year from 2004 to 2009, and each satellite royalty year from 2000-2009. Exhibit 8002 at 21-22; Tr. at 377-79; 386-89 (Gray).

61. Like Dr. Gray, Dr. Erdem also found a "positive and statistically significant" relationship between local ratings and distant viewing for all of the royalty years that he had data. Dr. Erdem acquired the Nielsen distant diary data that he relies on for 2000-2003 from MPAA as a part discovery in this proceeding. Tr. at 63-64 (Erdem).

62. SDC utilizes viewing-based methodology to measure relative market value of distantly retransmitted programs in the Devotional category, and relied on MPAA's Nielsen Diary Studies in its analysis. Tr. 53-54 (Erdem); Tr. 173-74, 180 (Sanders).

a. Program Retransmissions And Volume Statistics

63. Table 1 below presents summary statistics concerning the number of MPAA and IPG-claimed compensable programs and associated programming volume that aired on the Gray Cable Stations each year between 2004 and 2009, and on the Gray Satellite Stations each year between 2000 and 2009. Exhibit 8002 at 23 and Table 1; Tr. at 389-90 (Gray).

Table 1: MPAA- and IPG-Claimed Unique Compensable Programs.

	Cable		*Satellite*	
Year	MPAA	IPG	MPAA	IPG
2000			27,747	969
2001			27,354	865
2002			30,197	506
2003			32,207	513
2004	29,342	928	33,662	643
2005	27,548	954	32,818	609
2006	26,965	781	30,721	620
2007	25,727	654	30,123	549
2008	26,306	695	30,389	461
2009	35,142	774	31,019	614

Note: Calculations based on random samples of distantly retransmitted stations for CSOs for 2004-2009, random samples of distantly retransmitted stations for satellite carriers for 2000-2006, and all stations distantly retransmitted by satellite carriers in 2007-2009.

64. Table 1 shows that each year from 2004 to 2009, between 25,727 and 35,142 unique MPAA compensable programs aired on these randomly sampled stations retransmitted by

CSOs. In contrast, only between 654 and 954 unique IPG-claimed compensable programs aired on these stations over the same time period. Therefore, on average, each year from 2004 to 2009, MPAA represented over 36 times as many unique programs as did IPG on stations distantly retransmitted by CSOs. Similarly, between 27,354 and 33,662 unique MPAA-claimed compensable programs aired on the stations retransmitted by satellite carriers from 2000-2009, while only between 461 and 969 unique IPG-claimed compensable programs aired on the stations over the same time periods. Thus, on average, each year from 2000 to 2009, MPAA represented over 48 times as many unique programs as did IPG on stations distantly retransmitted by SSOs. Exhibit 8002 at 22-23; Tr. at 389-90 (Gray).

65. In addition to representing the copyright owners of far more programs than IPG, the MPAA-represented programs were retransmitted more often than IPG-represented programs. Table 2 shows that the total number of annual MPAA-represented program retransmissions by CSOs varied from 397,212 to 577,300 during the years 2004 through 2009, compared to IPG-claimed retransmissions for the same period which varied from 7,821 to 11,216. Meaning, on average, each of MPAA's programs was retransmitted approximately 17 times while each IPG-claimed program, on average, was retransmitted approximately 12 times. A similar disparity is seen in programming distantly retransmitted by SSOs, as each MPAA program was retransmitted approximately 17 times, while each IPG-claimed program, on average, was retransmitted approximately 8 times. Exhibit 8002 at 23-24 and Table 2; Tr. at 390-91 (Gray).

Table 2: MPAA- and IPG-Claimed Program Retransmissions.				
	Cable		*Satellite*	
Year	MPAA	IPG	MPAA	IPG
2000			592,816	10,861
2001			592,494	7,658
2002			573,635	7,177
2003			556,064	4,589
2004	526,835	7,821	555,310	5,366
2005	577,300	9,605	544,258	3,630
2006	462,225	10,836	511,962	5,376
2007	522,832	11,216	416,469	3,253
2008	397,212	9,628	399,030	2,259
2009	446,697	8,779	469,064	3,043

Note: Calculations based on random samples of distantly retransmitted stations for CSOs for 2004-2009, random samples of distantly retransmitted stations for satellite carriers for 2000-2006, and all stations distantly retransmitted by satellite carriers in 2007-2009.

66. Table 3 below demonstrates how MPAA's volume of programming far exceeds IPG's during the 2004 to 2009 cable royalty years and the 2000-2009 satellite royalty years. Exhibit 8002 at 25 and Table 3; Tr. at 391-92 (Gray).

Table 3: Total Volume (In Minutes) of MPAA and IPG-Claimed Program Retransmissions.				
	Cable		*Satellite*	
Year	MPAA	IPG	MPAA	IPG
2000			27,475,059	356,003
2001			27,154,480	234,682
2002			26,613,233	220,850
2003			25,997,729	161,997
2004	20,834,498	289,846	26,098,836	166,433
2005	22,422,723	408,607	25,363,941	133,005
2006	18,097,354	373,142	23,956,981	219,524
2007	20,614,187	494,112	19,306,430	152,675
2008	15,710,185	404,036	18,464,792	121,082
2009	17,828,996	323,776	21,870,339	176,379

Note: Calculations based on random samples of distantly retransmitted stations for CSOs for 2004-2009, random samples of distantly retransmitted stations for satellite carriers for 2000-2006, and all stations distantly retransmitted by satellite carriers in 2007-2009.

67. Programs varied in duration, from shows less than thirty-minutes to movies and specials several hours long. Table 3 shows that MPAA compensable programs ranged between 15.7 and 22.4 million minutes of distantly retransmitted air time on the randomly sampled Gray Cable Stations from 2004 to 2009. IPG-claimed retransmitted programs covered far less air time, between 289,846 and 494,112 minutes over the same time period. Similarly, satellite carriers retransmitted between 18.5 and 27.5 million minutes of MPAA programming each year between 2000 and 2009, while IPG-claimed programs covered only between 121,082 and 356,003 minutes over the same time period. Exhibit 8002 at 25-26; Tr. at 391-92 (Gray).

68. MPAA compensable programming constitutes the vast majority of retransmitted programming in the Program Supplier category. MPAA represented compensable programs

accounted for 98.63%, 98.21%, 97.98%, 97.66%, 97.49%, and 98.22% of total volume of Program Suppliers programming distantly retransmitted by CSOs over the years 2004, 2005, 2006, 2007, 2008, and 2009, respectively. Similarly, with respect to programming distantly retransmitted by satellite carriers over the years 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, and 2009, MPAA represented compensable programs accounted for 98.72%, 99.14%, 99.18%, 99.38%, 99.37%, 99.48%, 99.09%, 99.22%, 99.35%, and 99.20% of IPG and MPAA total volume, respectively. Exhibit 8002 at 26; Tr. at 391-92 (Gray).

69. However, the relative minutes, or volume, of programming retransmitted provides an imperfect metric of the relative value of the two sets of programs. The volume measure does not take into account what time of day the retransmission took place, the number of cable subscribers who had access to the distantly retransmitted broadcast, or the number of households who had access that watched the show. The share of viewing minutes provides a superior measure of relative value. Exhibit 8002 at 26-27.

70. While relative distant viewing provides a reasonable measure of a program's relative economic value in the context of this Phase II Proceeding, direct measures of distant viewing data are not available for all the years at issue in this proceeding. However, distant viewing information is available covering the years 2000 to 2003 in the Nielsen Diary data, and the years 2008 to 2009 in the Nielsen Distant Viewing Household meter data. Exhibit 8002 at 27.

b. Program Viewing Statistics

71. In order to determine distant viewing minutes throughout each year from 2004 to 2009 for cable, and 2000-2009 for satellite, Dr. Gray employed multiple regression analysis

techniques, relying upon the lists of MPAA and IPG-claimed compensable programs. Dr. Gray based his allocation of titles to MPAA and IPG based on each party's original list of claimed titles as adjusted by the Judges' resolution of the disputed titles in the Preliminary Hearing Order. Exhibit 8002 at 27; Preliminary Hearing Order at 15-35 and Exhibit A; Tr. at 393-94 (Gray).

72. Dr. Gray's regressions rely viewing data during sweeps months in 2000-2003, and for the entire year for 2008 and 2009, to calculate the mathematical relationship between distant viewing and (1) local or national ratings for the program, (2) the total number of distant subscribers of that station, (3) the year the program aired, (4) the time of day the program aired by quarter hour, (5) the type of program aired, and (6) the station affiliation the program aired on. The regressions demonstrate that there is a positive and statistically significant relationship between local ratings and distant viewing. The higher the ratings of a particular program on a national or local basis, all else equal, the higher the level of distant viewing. The regressions also show that the total number of a station's distant subscribers, the year the program aired, the time of day the program aired, the type of program aired, and the station affiliation the program aired on, each significantly affect distant viewing. Exhibit 8002 at 27-29; Tr. at 387-88; 393-98 (Gray).

73. Dr. Gray's economic model better predicts distant viewing with separate regressions for WGN and non-WGN stations. Exhibit 8002 at 28, n.40; Tr. at 387-88 (Gray).

74. Based on the mathematical relationship between distant viewing during sweeps months for 2000-2003, for the entire year for 2008-2009, and local ratings for all the years at issue in the instant proceeding, as well as the other factors described above, Dr. Gray calculated distant viewership for programs retransmitted by stations in his sample for each quarter hour, for

each entire calendar year, from 2004 to 2009 for cable, and for 2000-2009 for satellite. Exhibit 8002 at 28; Tr. at 387-88; 393-98 (Gray).

4. Addressing So-Called "Zero Viewing"

75. Dr. Gray performed a Poisson regression in order to take account of the extent of zero viewing, which is a commonly-used statistical tool to address zeroes, as well as positive values in a data set. Dr. Gray's regression analysis calculated distant viewing for every single program for every quarter-hour through his regression analysis, thus reducing "zero viewing" to less than 1 percent. Exhibit 8002 at 28 and Appendices D-1 and D-2 ; Tr. at 421-22 (Gray).

76. The presence of zero values does not affect the reliability of the Nielsen data. Zeros reported in the Nielsen Diary Studies are very useful data because they count among hundreds of thousands of observations of viewing. All of that information, taken together, enables reliable predictions concerning the level of viewing on a quarter-hour basis for each program. Tr. at 312-24; 337-40 (Lindstrom).

77. The high percentage of incidents of zero viewing in the Nielsen diary data does not indicate a lack of reliability, because (a) there are some stations that are retransmitted by CSOs and SSOs with very few subscribers, and (b) there are hundreds of thousands of observations of positive viewing from which one can make a reliable estimate of distant viewing on a program by program basis. Tr. at 312-24; 337-40; 353-54 (Lindstrom).

5. Royalty Share Allocations And 95% Confidence Intervals

78. Dr. Gray updated his analysis to reflect the Judges' Preliminary Hearing Order on the validity of claims with regard to both cable and satellite. Exhibit 8002 at 3, 9, 27.

79. Dr. Gray calculated confidence intervals using the bootstrap methodology. Exhibit 8002 at 29 n.42.

80. Dr. Gray's revised royalty shares for MPAA, and the 95% confidence intervals surrounding those shares, are as follows:

Table 4: MPAA Cable and Satellite Distant Viewing Shares of Program Suppliers Programming		
	Updated MPAA Share of Viewing with 95% Confidence Intervals	
Year	*Cable*	*Satellite*
2000		99.54 (99.52 – 99.56)
2001		99.75 (99.73 – 99.76)
2002		99.74 (99.72 – 99.76)
2003		99.65 (99.62 – 99.67)
2004	99.60 (99.50 – 99.64)	99.87 (99.86 – 99.88)
2005	99.60 (99.38 – 99.61)	99.73 (99.71 – 99.74)
2006	99.34 (99.15 – 99.35)	99.65 (99.63 – 99.67)
2007	99.44 (99.19 – 99.47)	99.77 (99.76 – 99.78)
2008	99.28 (99.26 – 99.32)	99.78 (99.78 – 99.80)
2009	99.44 (99.39 – 99.48)	99.57 (99.55 – 99.58)

Exhibit 8002 at 29; Tr. at 376-77 (Gray).

IV. Dr. Gray's Analysis In This Proceeding Fully Addressed The Judges' May 4, 2016 Order.

81. On May 4, 2016, the Judges issued their *Order Reopening The Record And Scheduling Further Proceedings* ("May 4 Order") in this case. In the May 4 Order, the Judges questioned Dr. Gray's approach because of the lack of contemporaneous distant viewing data for

the 2004-2009 time frame to support a correlation between local ratings and distant viewing during those royalty years. During the April 2015 hearing in this proceeding, Dr. Gray testified that, based on his work, he did not expect that additional distant viewing data would have a material impact on his royalty share estimates for MPAA and IPG. Notwithstanding, in the May 4 Order, the Judges reopened the record for further proceedings, and directed the parties to submit additional written direct testimony addressing royalty allocation. Exhibit 8002 at 10; *see also* May 4 Order at 3-4.

82. Following the issuance of the May 4 Order, MPAA obtained additional distant viewing data from Nielsen for 2008 and 2009 (cable and satellite). Dr. Gray re-performed his calculations using these additional viewing data. Dr. Gray's revised estimates are consistent with the results he reported to the Judges in 2015. Exhibit 8002 at 10, 29 n.43, 30 n.44; Tr. at 398-400 (Gray).

Initial Viewing Share Estimates, Based on 2000-2003 Nielsen Distant Viewing Measures and Updated Estimates Based on 2000-2003 & 2008-2009 Nielsen Distant Viewing Measures

Royalty Year	Cable Initial	Cable Updated	Satellite Initial	Satellite Updated
2000			99.65%	99.54%
2001			99.77%	99.75%
2002			99.80%	99.74%
2003			99.61%	99.65%
2004	99.59%	99.60%	99.87%	99.87%
2005	99.55%	99.60%	99.78%	99.73%
2006	99.32%	99.34%	99.73%	99.65%
2007	99.28%	99.44%	99.74%	99.77%
2008	99.19%	99.28%	99.77%	99.78%
2009	99.39%	99.44%	99.58%	99.57%
Average	***99.39%***	***99.45%***	***99.73%***	***99.71%***

Source: Exhibit 8002, Gray WDT, at pp. 29-30, Table 4 and n.43-44.

83. In the May 4 Order, the Judges also raised a question regarding Dr. Gray's use of a "base year" within his regression. May 4 Order at 4, n.5. Dr. Gray addressed this concern in his analysis submitted for this proceeding by modifying his specification. Tr. at 393-94 (Gray).

84. Dr. Gray's revised analysis, submitted here as Exhibit 8002, fully addressed all of the questions raised by the Judges in the May 4 Order. Tr. at 400 (Gray).

V. Cable Operators And Satellite Carriers Rely On Nielsen Ratings, And Viewership Information Measured By Nielsen, In Making Programming Decisions.

A. John Sanders

85. John S. Sanders is Principal at Bond & Pecaro, Inc., which specializes in the appraisal of communications and media assets. Mr. Sanders has over thirty years of real life experience advising buyers and sellers and licensors and licensees of television programs with regard to the value of those television programs. Exhibit 7001 at 3-4; Tr. at 160-64 (Sanders).

86. The most critical aspect of an evaluation of the relative market value of programming is to ascertain whether the public is actually viewing the programs. Both cable operators and satellite carriers care whether or not people are watching because viewers beget subscribers. Tr. at 175, 177-78, 231-32 (Sanders).

87. CSOs and SSOs design their channel line-ups to be attractive to subscribers. System operators will endeavor to offer programs that viewers are most interested in watching. Programs that no one watches, with no meaningful evidence of viewership, are not going to attract and retain subscribers. Meaningful evidence of viewership is critical to an appraiser in order to quantify and accurately calculate value. Tr. at 177-79, 226-27 (Sanders).

88. The most commonly accepted and highly regarded source of viewership data in the industry of media valuation are the ratings reports compiled by Nielsen. Exhibit 7001 at 12-13; Tr. at 227-28 (Sanders).

89. CSOs and SSOs rely on viewership data for their programming decisions. Nielsen ratings are the best reflection of viewership in the industry, and are commonly used by CSOs and SSOs. It is not necessary to subscribe to Nielsen to actually use the data—it is available to CSOs and SSOs through numerous outlets. Tr. at 202-03 (Sanders).

90. CSOs and SSOs will engage in some type of market research to determine that a particular program or a particular station evidences a meaningful level of viewership before making a decision regarding whether to acquire the program or station. Nielsen data is the most ubiquitous and authoritative source for that data. Nielsen viewership ratings are the best measure for determining the relative marketplace value of retransmitted programming. Exhibit 7001 at 13-15, 21.

B. Toby Berlin

91. Ms. Berlin was a Vice President of Programming Acquisitions at DirecTV. She worked in that capacity from October of 1998 through July of 2013, and was responsible for making content acquisition decisions for DirecTV. One of Ms. Berlin's responsibilities was deciding which out-of-market broadcast signals DirecTV would carry. Although Ms. Berlin worked for DirecTV, a SSO, she is also familiar with the cable industry. Exhibit 7003 at 61-64; Exhibit 7002 at 3.

92. While working at DirecTV, Ms. Berlin relied on Nielsen ratings information for her program acquisition decisions. Nielsen ratings were an important single driver in her

decision to carry or retransmit a station. Ms. Berlin believes this is consistent with the very simple paradigm that satellite operators value programs that people watch and do not value programs that people do not watch. Exhibit 7002 at 6-7.

93. Ms. Berlin also relied on Nielsen ratings within specific niche or specialty genres of programming in order to determine which stations to carry. Nielsen ratings are what everyone in the industry uses to determine the popularity of programming, and Ms. Berlin considered them to provide the best indicator of the popularity of stations. Exhibit 7003 at 78-81; Exhibit 7002 at 6-7.

94. When making a decision to retransmit a particular station out of market, Ms. Berlin would look at the Nielsen ratings both for the originating market and also the outside market. She found that both were good indicators of popularity. When Ms. Berlin did not have Nielsen ratings information available for a particular station, she would look at the Nielsen ratings information for the particular DMA in which the station resided. Ms. Berlin found the Nielsen data very valuable in her decision-making. Exhibit 7003 at 81-82, 84-86; Exhibit 7002 at 6-7.

95. Within a particular sub-genre, such as Devotional programming, Ms. Berlin considered the content to be reasonably homogenous, and relied on Nielsen ratings information to inform her regarding what was popular in a particular DMA, or out-of-market DMA. Exhibit 7003 at 82-83.

96. In making programming decisions for DirecTV, Ms. Berlin would consider both Nielsen ratings for a particular station, and also for particular programs on the station so that she could ascertain what was driving the value for the station. Exhibit 7003 at 89-90, 111-12.

97. During Ms. Berlin's tenure at DirecTV, DirecTV did not have a subscription directly with Nielsen for ratings data. However, DirecTV would have access to Nielsen ratings through a number of different research, marketing, and advertising sources. DirecTV would typically have access to, and consider, Nielsen ratings for everything possible within a DMA, including ratings for every broadcaster and every cable network. DirecTV also looked at national and regional Nielsen ratings. Exhibit 7003 at 125-27; Exhibit 7002 at 6.

VI. Reasonable Royalty Share Awards For The Program Suppliers Category

98. MPAA has presented convincing, reliable evidence justifying the following share allocations between MPAA and IPG for each of the 2004-2009 Cable and 2000-2009 Satellite royalty years:

Cable Royalty Year	**MPAA Share Of PS Fund (%)**	**IPG Share Of PS Fund (%)**
2004	99.60%	0.40%
2005	99.60%	0.40%
2006	99.34%	0.66%
2007	99.44%	0.56%
2008	99.28%	0.72%
2009	99.44%	0.56%

Satellite Royalty Year	**MPAA Share Of PS Fund (%)**	**IPG Share Of PS Fund (%)**
2000	99.54%	0.46%
2001	99.75%	0.25%
2002	99.74%	0.26%
2003	99.65%	0.35%
2004	99.87%	0.13%
2005	99.73%	0.27%
2006	99.65%	0.35%
2007	99.77%	0.23%
2008	99.78%	0.22%
2009	99.57%	0.43%

Exhibit 8002 at 29; Tr. at 376-77 (Gray).

PROPOSED CONCLUSIONS OF LAW

I. Purpose Of Proceeding

1. Pursuant to Sections 111 and 119 of the Copyright Act, the Copyright Office collects royalties from cable systems and satellite carriers on a semi-annual basis.[1] The Phase I allocation of the 2004-2009 Cable Funds was based on a determination of the Judges as to the 2004 and 2005 cable royalty funds, followed by a confidential Phase I settlement.[2] The Phase I allocation of royalties for the 1999-2009 Satellite Funds was determined by a confidential Phase I settlement.[3] The purpose of this proceeding is to determine the Phase II allocation of the 2004-2009 Cable Funds and the 1999-2009 Satellite Funds within two of these mutually-exclusive Phase I claimant categories: the Program Suppliers category and the Devotional category.

2. The Program Suppliers Phase I category is defined as follows:

> "**Program Suppliers**." Syndicated series, specials and movies, other than Devotional Claimants programs as defined below.
>
> Syndicated series and specials are defined as including (1) programs licensed to and broadcast by at least one U.S. commercial television station during the calendar year in question, (2) programs produced by or for a broadcast station that are broadcast by two or more U.S. television stations during the calendar year in question, and (3) programs produced by or for a U.S. commercial television station that are comprised

[1] *See* 17 U.S.C. §§ 111 and 119.

[2] *See* 75 Fed. Reg. 57063, 57079 (Sept. 17, 2010); *Order On Motions For Distribution*, Docket Nos. 2007-3 CRB CD 2004-2005, 2008-4 CRB CD 2006, 2009-6 CRB CD 20078, 2010-6 CRB CD 2008, 2011-7 CRB CD 2009, 2010-2 CRB SD 2004-2007, 2010-7 CRB SD 2008, 2011-8 CRB SD 2009 (Feb. 17, 2012) ("Order On Motions For Distribution").

[3] *See* Order On Motions For Distribution.

predominantly of syndicated elements, such as music video shows, cartoon shows, "PM Magazine," and locally hosted movie shows.[4]

3. The Devotional Phase I category is defined as follows:

> "**Devotional Claimants**." Syndicated programs of a primarily religious theme, not limited to those produced by or for religious institutions.[5]

4. MPAA reached a Phase II settlement with all parties, including IPG, as to the Phase II allocation of the 1999 satellite royalty fund within the Program Suppliers category, and those funds were finally distributed in 2013.[6] As a result, Phase II controversies remain outstanding in the Program Suppliers category only as to the 2000-2009 Satellite Funds.

5. Before the Judges commenced this proceeding, MPAA reached confidential Phase II settlements with the National Association of Broadcasters, Home Shopping Network, and USA Broadcasting Productions, Inc., InterActive Corp. (formerly USA Interactive) and Studios USA) (collectively, "USA/IAC") as to the 2004-2009 Cable Funds, and with the Broadcaster Claimants Group and USA/IAC as to the 2000-2009 Satellite Funds. But for the settlements, these parties would be participating in this proceeding. As a result of these settlements, the aforementioned parties relinquished any further claims to the 2004-2009 Cable Funds and the

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[4] Exhibit 8011 at Addendum B.

[5] Exhibit 8011 at Addendum B.

[6] *See* 78 Fed. Reg. 50114, 50115 (Aug. 16, 2013) (citing *Order*, Docket No. 2008-5 CRB SD 1999-2000 (June 19, 2013)).

2000-2009 Satellite Funds.[7] However, MPAA was unable to reach a Phase II settlement with IPG as to the 2004-2009 Cable Funds or the 2000-2009 Satellite Funds.

6. In this proceeding, the Judges must make a Phase II royalty allocation between MPAA and IPG as to the 2004-2009 Cable Funds and the 2000-2009 Satellite Funds for the Program Suppliers category. For the Devotional category, the Judges must make a Phase II royalty allocation in this proceeding for the 2004-2009 Cable Funds and the 1999-2009 Satellite Funds between SDC and IPG.[8]

7. IPG originally claimed to represent the interests of 118 entities in the Program Suppliers category as to the 2004-2009 Cable Funds, and 153 entities in the Program Suppliers category as to the 1999-2009 Satellite Funds.[9] On March 13, 2015, the Judges issued their Preliminary Hearing Order. In the Preliminary Hearing Order, the Judges dismissed 32 IPG Program Suppliers claimants as to some or all of the 2004-2009 Cable Funds, and 83 IPG Program Suppliers claimants as to some or all of the 2000-2009 Satellite Funds.[10] As a result of these dismissals, the list of IPG-represented Program Suppliers claimants for the 2004-2009 Cable Funds decreased to 88 entities in 2004, 88 entities in 2005, 87 entities in 2006, 89 entities in 2007, 88 entities in 2008, and 88 entities in 2009.[11] For the 2000-2009 Satellite Funds, the list of IPG-represented Program Suppliers claimants decreased to 101 entities in 2000, 110 entities in

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[7] The Judges also dismissed Petitions to Participate filed by David Powell, holding that he had failed to demonstrate a significant interest in this proceeding. *See Orders Dismissing Petition To Participate (Phase II)*, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at 1-2 (April 18, 2014).

[8] *See* Preliminary Hearing Order at 1.

[9] *See* Direct Statements Of Independent Producers Group, Docket Nos. 2012-6 CRB CD 2004-2009 (Phase II) and 2012-7 CRB SD 1999-2009 (Phase II) at Exhibits IPG-1(May 9, 2014).

[10] *See* Preliminary Hearing Order at 28-35 and Exhibit A.

[11] *See* Preliminary Hearing Order at 28-35 and Exhibit A.

2001, 111 entities in 2002, 112 entities in 2003, 111 entities in 2004, 111 entities in 2005, 110 entities in 2006, 111 entities in 2007, 79 entities in 2008, and 111 entities in 2009.[12] On October 27, 2016, the Judges modified the Preliminary Hearing Order to credit IPG with one claimant that had previously been dismissed as to the 2008 satellite royalty year, thereby revising the number of IPG-represented Program Suppliers entities for 2008 satellite to 80.[13]

II. Legal Standards For Allocating Cable And Satellite Royalties

8. Section 803(a)(1) of the Copyright Act provides that:

> The Copyright Royalty Judges shall act in accordance with this title, and to the extent not inconsistent with this title, in accordance with subchapter II of chapter 5 of title 5, in carrying out the purposes set forth in section 801. The Copyright Royalty Judges shall act in accordance with regulations issued by the Copyright Royalty Judges and the Librarian of Congress, and on the basis of a written record, prior determinations and interpretations of the Copyright Royalty Tribunal, Librarian of Congress, the Register of Copyrights, copyright arbitration royalty panels (to the extent those determinations are not inconsistent with a decision of the Register of Copyrights. . . and the Copyright Royalty Judges . . . and decisions of the court of appeals under this chapter before, on, or after the effective date of the Copyright Royalty and Distribution Reform Act of 2004.[14]

9. Subchapter II of chapter 5 of title 5 of the U.S. Code sets forth the terms and procedures applicable to agency proceedings. Cable and satellite royalty distribution proceedings under 17 U.S.C. §§ 801(b)(3)(B) and 804(b)(8) fit within the meaning of "adjudication" under 5 U.S.C. § 551(7) and are subject to the procedures set forth in 5 U.S.C. § 554. Further direction for the conduct of such hearings is provided in 5 U.S.C. § 556. In particular, § 556(d) provides that "the proponent of a rule or order has the burden of proof." This

[12] *See id.*

[13] *Order Granting IPG Fourth Motion For Modification Of March 13, 2015 Order* at 1-2 (October 27, 2016).

[14] 17 U.S.C. § 803(a)(1).

provision has been interpreted to mean that the proponent has the burden of persuasion, not simply the burden of production.[15] In the instant proceeding, this means that each party seeking specific Phase II distribution shares of the 2004-2009 Cable and 2000-2009 Satellite Funds has the burden of persuasion that its requested share is adequately supported in the record to be adopted as the appropriate distribution award by the Judges.[16]

III. The Distribution Standard – Relative Marketplace Value

10. Congress did not set forth a statutory standard for cable and satellite royalty allocations. However, past decisions of the Judges, the CARP, the Librarian and the D.C. Circuit have held that the royalty shares awarded should reflect the relative marketplace value of the programming at issue, *i.e.*, the relative amounts of royalties that each claimant would receive for its programming in a free market, absent compulsory licensing.[17] Relative market value corresponds to the price at which the right to retransmit a program carried on a distantly retransmitted broadcast signal would change hands between a willing buyer (a CSO or a SSO) and a willing seller (a copyright owner), neither being under any compulsion to buy or to sell, and both having reasonable knowledge of the relevant facts.[18] That is, assuming the compulsory license did not exist, relative market value is the price at which the CSO or SSO, or their representative, would pay the copyright owner, or the copyright owner's representative, for the

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[15] *Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267, 270-80 (1994); *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 871-72 (D.C. Cir. 2002).

[16] *See id.*

[17] *See* 2000-2003 Decision at 64986 ("Relative marketplace value is the preeminent consideration for allocating shares of royalties to programs or groups of programs."); *Program Suppliers v. Librarian of Cong.*, 409 F.3d 395, 401 (D.C. Cir. 2005) ("We detect nothing arbitrary or capricious about using relative market value as the key criterion for allocating awards. Indeed, it makes perfect sense to compensate copyright owners by awarding them what they would have gotten relative to other owners absent a compulsory licensing scheme.").

[18] *See* 2000-2003 Decision at 64991-92 (quoting *U.S. v. Cartwright*, 411 U.S. 546, 551 (1973)).

right to distantly retransmit the program. Relative market value remains a reliable basis for royalty distribution, and is the standard by which the Judges should allocate the royalties at issue in this proceeding.[19]

IV. Prior Phase II Decisions In The Program Suppliers Category Consistently Ruled That Distant Viewership Is Probative Evidence Of Relative Market Value.

11. There is a long history of litigated Phase II proceedings regarding allocation of royalty awards among claimants within the Program Suppliers category. MPAA has been an active participant in all of these proceedings, all but three of which involved three or more Phase II Participants.[20] Below is a chart of past Phase II cable awards in the Program Suppliers category:

MPAA-represented Program Suppliers' Litigated Phase II Cable Awards

Cable Royalty Year	MPAA Phase II Award (%)	Aggregate Phase II Awards to All Other PS Parties (%)	Federal Register Citation
1979[21]	96.300	3.700	49 Fed. Reg. 20048 (May 11, 1984)
1980	96.900	3.100	48 Fed. Reg. 9552 (Mar. 7, 1983)
1981	96.900	3.100	49 Fed. Reg. 7845 (Mar. 2, 1984)
1982	97.500	2.500	49 Fed. Reg. 37653 (Sept. 24, 1984)
1983	98.200	1.800	51 Fed. Reg. 12792 (Apr. 15, 1986)
1984	98.475	1.525	52 Fed. Reg. 8408 (Mar. 17, 1987)
1985	99.175	0.825	53 Fed. Reg. 7132 (Mar. 4, 1988)
1986	98.500	1.500	54 Fed. Reg. 16148 (Apr. 21, 1989)

[19] 2000-2003 Decision at 64992-93.

[20] All of the Phase II Proceedings in the Program Suppliers category involved three or more Phase II Program Suppliers participants, with the exception of the 1985 Cable Phase II Proceeding, which involved only MPAA and Multimedia Program Productions, Inc. ("Multimedia"), and the 1997 Cable and 2000-2003 Cable Phase II Proceedings, which involved only MPAA and IPG. But for MPAA settlements with other Phase II Program Suppliers participants discussed *supra*, this proceeding would have involved more than two parties in the Program Suppliers category and would have resulted in even lower proposed shares for IPG.

[21] In the 1979 Distribution Proceeding, the programming now represented by the Devotional Claimants was included in the syndicated programming category, thereby reducing the MPAA-represented Program Suppliers' Phase II percentage share of the syndicated programming fund by the amount attributable to devotional programming. *See* 49 Fed. Reg. at 20048, 20051 (May 11, 1984).

1997	99.788	0.212	66 Fed. Reg. 66433 (Dec. 26, 2001)[22]
2000	98.840	1.160	78 Fed. Reg. 64984 (Oct. 30, 2013)
2001	99.690	0.310	78 Fed. Reg. 64984 (Oct. 30, 2013)
2002	99.640	0.360	78 Fed. Reg. 64984 (Oct. 30, 2013)
2003	99.770	0.230	78 Fed. Reg. 64984 (Oct. 30, 2013)

12. What is clear from this history is that MPAA consistently received the lion's share of the Program Suppliers category royalties in every prior litigated Phase II proceeding. Apart from the significant royalty share awarded to MPAA, the next highest individual Phase II royalty share ever awarded in the thirty-year history of the Program Suppliers category was the 1.6% share attributed to Multimedia in the 1979 Cable Phase II Proceeding.[23] Multimedia's share of the Program Suppliers royalties declined over time. In the 1986 Phase II Proceeding litigated before the CRT, the last Phase II proceeding in which Multimedia participated, Multimedia's royalty share decreased to 0.825%.[24] All of the CRT Phase II awards relied "primarily on the basis of the special Nielsen study of cable household viewing of distant signals," which the CRT found "demonstrated the marketplace value" of Program Suppliers programming.[25]

13. The only Phase II Proceeding in the Program Suppliers category held under the CARP system was the 1997 Cable Phase II Proceeding, which took place in 2001. That proceeding involved only MPAA and IPG, and IPG's sole witness in that proceeding was Raul

[22] The CARP decision in the 1997 Cable Phase II Proceeding was not adopted by the Librarian, who remanded for a new CARP proceeding. *See* 66 Fed. Reg. 66433 (Dec. 26, 2001). The Librarian subsequently vacated that decision. *See* 69 Fed. Reg. 23821 (April 30, 2004).

[23] *See* 49 Fed. Reg. at 20051.

[24] *See* 54 Fed. Reg. 16148 (awarding 0.825% to Multimedia, 0.675% to the National Association of Broadcasters, and the remaining 98.5% to MPAA).

[25] *See id.*

Galaz. Although the Librarian determined in that proceeding that "viewing of programs is probative in assessing their value in a Phase II proceeding,"[26] based on the record in that proceeding, the Librarian refused to adopt the CARP report and remanded the matter for a new proceeding with a different panel of arbitrators.[27]

14. Both MPAA and IPG appealed the Librarian's 1997 Cable Phase II determination (issued on December 26, 2001) to the D.C. Circuit. While that appeal was pending, Mr. Galaz pled guilty to and was convicted of felony mail fraud in connection with cable royalties fraudulently obtained from MPAA while posing as a legitimate compulsory license claimant.[28] In the course of that criminal proceeding, Mr. Galaz admitted that he had lied under oath during his testimony before the CARP in the 1997 Cable Phase II Proceeding.[29] Following Mr. Galaz's conviction and imprisonment, MPAA, IPG, and the Librarian negotiated a three-party settlement resolving the pending appeal of the 1997 Cable Phase II decision, as well as other issues.[30] As a part of that settlement, the Librarian vacated the 1997 Cable Phase II decision on April 30, 2004.[31] Because the decision was vacated by the Librarian, it has no precedential value in this proceeding.[32]

[26] *See* 66 Fed. Reg. 66433, 66451 (December 26, 2001).

[27] *Id*. at 66454.

[28] *See* Preliminary Hearing Order at 9-10; *Ruling And Order Regarding Claims*, Docket No. 2008-1 CRB CD 98-99 (Phase II) at 3-4 (June 18, 2014).

[29] *See id.*

[30] *See Order Granting In Part Motion For Final Distribution Of The 1998 And 1999 Cable Royalty Funds And The 1999 Satellite Royalty Funds*, Docket No. 2008-1 CRB CD 98-99 (Phase II), et al. (January 31, 2013).

[31] *See* 69 Fed. Reg. 23821, 23822 (April 30, 2004).

[32] *See id.*; *see also Order Denying Indep. Producers Grp.'s Mot. For Partial Distr.*, Docket No. 2008-2 CRB CD 2000-2003 (Phase II) at 3, n.2 (Jan. 17, 2012) (explaining that the CARP's award to IPG in the 1997 Cable Phase II Proceeding was not adopted by the Librarian).

15. The last Phase II Proceeding in the Program Suppliers category that was litigated to a resolution was the 2000-2003 Cable Phase II Proceeding, which was also between only MPAA and IPG. In that proceeding, the Judges confirmed that while there is no single formula or source for allocating royalties, "actual measured viewing is significant to determining relative marketplace value," and "viewing data compiled by [Nielsen] are a useful starting point for determination of actual viewership."[33] In the 2000-2003 Cable Phase II Proceeding, the Judges credited the testimony of Dr. Gray, who performed a regression analysis using Nielsen diary data and local ratings data, along with other data sets, to project estimated distant viewing for each and every MPAA and IPG program on the stations in his random sample for each day of the entire 2000-2003 royalty period. The Judges agreed with Dr. Gray that viewership, measured by Nielsen, can be "a reasonable and directly measureable metric for calculating relative market value in cable distribution proceedings."[34] The Judges relied on Dr. Gray's regression analysis as the basis for the allocation of 2000-2003 cable royalties between MPAA and IPG in the Program Suppliers category, subject to some minor adjustments.[35] In contrast, the Judges ruled that IPG's methodology was "seriously deficient," and could not be used to establish the parameters of the zone of reasonableness for the allocation of royalties within the Program Suppliers category.[36] The D.C. Circuit affirmed these rulings.[37]

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[33] 2000-2003 Decision at 64986.

[34] *Id.* at 64995-96.

[35] *Id.* at 64995-98, 65002. The Judges determined that the "zone of reasonableness" in the Program Suppliers category corresponded with the 95% confidence intervals that Dr. Gray computed for MPAA's proposed distribution allocation, and made royalty awards to MPAA and IPG for the 2000-2003 cable royalty years within those confidence intervals for each year. *See id.* at 65003.

[36] 2000-2003 Decision at 64999-65002.

[37] *See Indep. Producers Grp. v. Librarian of Cong., et al.*, 792 F.3d 132 (D.C. Cir. 2015).

16. In the instant proceeding, MPAA presented essentially the same methodology they presented in the 2000-2003 Cable Phase II Proceeding, but modified to apply to a different set of cable and satellite royalty funds: the 2004-2009 Cable Funds and the 2000-2009 Satellite Funds. MPAA has also now fully addressed the questions regarding MPAA's methodology that were raised by the Judges in their May 4 Order.[38] As in the 2000-2003 Cable Phase II Proceeding, MPAA's viewing-based methodology remains a direct and reasonable means for determining the relative market value of programs in the Program Suppliers category.[39]

[38] May 4 Order at 3-4.

[39] 2000-2003 Decision at 64999-65002.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent electronically on May 8, 2018, and also served via the eCRB system on the following:

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Certificate of Service

I hereby certify that on Tuesday, May 08, 2018 I provided a true and correct copy of the MPAA-Represented Program Suppliers' Proposed Findings of Fact and Proposed Conclusions of Law to the following:

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